IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

WEDNESDAY, THE 28TH MARCH 2007 / 7TH CHAITHRA 1929

AS.No. 179 of 1999(D)

OS.399/1990 of II ADDL.SUB COURT,THRISSUR

APPELLANT: 10th DEFENDANT:

REGHU MENON, S/O.LATE PADMANABHAN NAIR,
REGHUNATH APARTMENT, ROOM NO.9, IIND FLOOR,
CO-OPERATIVE HOUSING SOCIETY, DOMBIVILI EAST,
MUMBAI – 421 201.

BY ADV. SRI.V.GIRI

RESPONDENTS: PLAINTIFFS & DEFENDANTS 1 TO 9:

1. REMADEVI, NOW RESIDING AT KAIPARAMBU VILLAGE, TRICHUR TALUK, D/O.DEVAKIKUTTY AMMA, MAZHUVANCHERRY DESOM, ERANELLOOR VILLAGE, THALAPPILLY TALUK.

2. PRASANNA, D/O.REMADEVI, RESIDING AT -DO- -DO-

3. PRAMADA, CC 8, VAGARAM COMPLEX, DHARAVI ROAD, VISHARANTAWADI, PUNA 400 015.

4. PUSHKIN, S/O.REMADEVI, RESIDING AT KAIPARAMBU VILLAGE, TRICHUR TALUK.

5. DEVAKY KUTTY AMMA, RAGHUNATH APARTMENTS, ROOM NO.9 (2ND FLOOR), CO-OPERATIVE SOCIETY SARAAWAL COLONY, THAKRLI, DOMBIVILLI EAST, THANA – 421 201, MUMBAI.

6. SANTHI DEVI, C/O.C.K.MENON, 303 R.K.APARTMENT, BEACH ROAD, VISHAKAPATANAM, ANDHRA PRADESH.

7. SANIL, C/O.C.K.MENON, -DO- -DO-

8. SAJITH, C/O.C.K.MENON, -DO- -DO-

9. PADMA, D/O.CHETTUVATTY DEVAKIKUTTY AMMA,
NOW RESIDING AT "KRISHNA KRIPA, MULAVARA, THRISSUR.

10. RAJEEVAN, S/O.PADMA, RESIDING AT -DO- -DO-

11. MR.RAVI MENON, 14 SATHIA BHAMA NIVAS,
DOMBIVILLI EAST THANA, GURUMANDIR ROAD, MUMBAI.

12. SASI MENON, P.B.NO.26964, MANAMA, BAHARIN.

13. C.SUMA, C/O.RAJAN MENON, PEEDIKAPARAMBIL HOUSE,
P.O.PULLOOT (VIA) KODUNGALLOOR.

14. PREETHA , C/O.C.MURALEEDHARAN, ERATH HOUSE,
LAKSHMY NILAYAM, KONIKKARA, THALORE,
THRISSUR DISTRICT.

R1 TO R12 BY ADV. SRI.G.UNNIKRISHNON
SRI.P.V.RAMESH SHANKAR
SRI.G.P.SHINOD

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 28/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.M.P.NO.1496/2000 IN A.S.NO.179/1999

DISMISSED

28/3/2007 SD/- K.T.SANKARAN, JUDGE

//true copy//

ahz/

K.T. SANKARAN, J.

A.S. NO. 179 OF 1999 F

Dated this the 28th day of March, 2007

JUDGMENT

The tenth defendant in O.S.No.399 of 1990, on the file of the Sub Court, Thrissur, challenges the preliminary decree for partition passed by the court below. The suit was filed by respondents 1 to 4 in the Appeal, claiming 4/15 shares in the plaint schedule property having an extent of one acre 45½ cents. The trial court passed the preliminary decree holding that the plaintiffs are entitled to 4/15 shares.

2. The parties to the suit belong to a Marumakkathayam tarwad. In the year 1121 M.E., there was a tarwad partition evidenced by Ext.A1. Item Nos. 31 to 46 in the A schedule to the partition deed were allotted to the 4th thavazhi consisting of Unnymayamma, her daughter Devaky Amma (first defendant) and Devaky Amma's children Remadevi (first plaintiff) and an unnamed minor child (fifth defendant). There is no dispute that a thavazhi came into existence and that

Unnymayamma, executant No.11 in Ext.A1, was the karanavathy of that thavazhi. Item Nos.31 to 46, consisting of `nilam' and `paramba', the total extent of which will come to around ten acres, were allotted to that thavazhi. In the year 1124 M.E., as per Ext.A2, Unnymayamma purchased the plaint schedule property for a consideration of Rs.500/- from a stranger. At the time of purchase of Ext.A2 property, there was a mortgage liability outstanding in favour of Raman Nair, brother of Unnymayamma. In Ext.A2, a sum of Rs.425/- is reserved with the assignee Unnymayamma to discharge the simple mortgage debt due to Raman Nair.

3. The case of the plaintiffs is that the plaint schedule property was purchased by Unnymayamma out of the income from the thavazhi properties and out of the amount realised by her from the debtors mentioned in Ext.A1 partition deed. It was contended by them that Unnymayamma had no separate properties or funds for the acquisition of the plaint schedule property and that

she being the karanavathy of the thavazhi, there is a presumption that the acquisition is in favour of the thavazhi. In the written statement filed by the first defendant and in the separate written statement filed by defendants 5 and 10, the contention put forward by them is that the plaint schedule property was purchased by Unnymayamma out of her own funds and not utilising the thavazhi funds. It was contended that the husband of Unnymayamma was a teacher and enough funds were available for purchase of the property by Unnymayamma as her self-acquisition. It was therefore contended by the contesting defendants that the plaintiffs are not entitled to any share in the plaint schedule property. The further contention raised by the defendants is that admittedly, item Nos.31 to 46 in Ext.A1 are the thavazhi properties and that members of the thavazhi are entitled to the same, even going by the averments in the plaint. However, the plaintiffs have not included those items in the suit for partition and, therefore, the present suit is bad for partial partition. It is stated in the plaint that there are

thavazhi properties available to the members of the thavazhi which they got under Ext.A1. It is stated in the plaint that the fifth defendant attempted to construct a house in a portion of the plaint schedule property, which necessitated the immediate filing of the suit for partition of the plaint schedule property. It is also stated that steps were being taken to file a suit for partition in respect of the thavazhi properties allotted to the thavazhi under Ext.A1.

4. The evidence available before the trial court consists of Exts.A1 and A2 and Exts.B1 to B3 and the oral evidence of the first plaintiff as PW1 and that of the fifth defendant as DW1. On the basis of the oral and documentary evidence in the case, the trial court came to the conclusion that the defendants failed to prove that the plaint schedule property was acquired with the separate funds available to Unnymayamma. It was held that she being the karanavathy of the thavazhi, it shall be presumed that the acquisition was on behalf of the thavazhi and for the benefit of the

thavazhi. As regards the contention that the suit is bad for partial partition, the trial court held that in the peculiar facts and circumstances of the case, the suit is not bad for partial partition. The court below relied on the decision of this Court in **Parameswara Menon** v. **Sachidananda Menon** (1970 KLT 1031).

5. The points arising for consideration in this Appeal are the following: (1) Whether the suit is bad for partial partition; and (2) Whether the plaint schedule property belongs to the thavazhi of the plaintiffs and the defendants or whether it is a self-acquisition of Unnymayamma.

6. **Point No.1**: The court below has stated sufficient reasons for coming to the conclusion that in the facts and circumstances of the case, it cannot be held that the suit is bad for partial partition. I agree with the reasoning and conclusion made by the court below. More over, it has come out in evidence that the tenth defendant in the present suit (appellant

herein) had filed a suit for partition for partitioning the thavazhi properties available under Ext.A1. It is submitted by the learned counsel for respondents 1 to 4 that O.S.No.97 of 1997, on the file of the Munsiff's Court, Wadakkancherry, was filed by the appellant herein claiming partition of those items and that a preliminary decree was passed in that suit on 27.2.1999. Though the plaintiffs in the present suit filed A.S.No.225 of 1999 challenging the preliminary decree in O.S.No.97 of 1997, that appeal was dismissed on 22.8.2003 and against which the present plaintiffs have filed R.S.A.No.38 of 2004 before this Court. That Second Appeal is pending disposal. In view of the institution of a suit for partition of the thavazhi properties available under Ext.A1, it cannot be held that the present suit from which this Appeal arises is bad for partial partition. Point No.1 is held accordingly, confirming the finding of the trial court.

7. **Point No.2**: It is not disputed that Unnymayamma was the karanavathy of the thavazhi. It

is not in dispute that item Nos.31 to 46 were allotted to the thavazhi. Some of the items were tenanted items while the rest of the items were in possession of the thavazhi. There is no clear evidence to indicate the extent of the property which was in the possession of the thavazhi or the income which was available to the thavazhi by cultivation of the properties and by way of receipt of rent from the tenants. The burden of proof is on the contesting defendants to establish that the plaint schedule property was acquired by Unnymayamma out of her own funds. Since Unnymayamma was the karanavathy of the thavazhi, there is a presumption that the acquisition made by her is for the benefit of the thavazhi. It is to be noted that Ext.A1 partition was in the year 1121 M.E., while the plaint schedule property was purchased as per Ext.A2 in the year 1124 M.E. There is no evidence to indicate that any separate funds were available with Unnymayamma for the purchase of the plaint schedule property. The first defendant was not examined in the case. There is no independent evidence to establish that Unnymayamma was

having enough separate funds for the acquisition of the property. There is also no independent evidence to arrive at the conclusion that the income from the thavazhi properties was not sufficient for the acquisition of the plaint schedule property. The fifth defendant was examined as DW1. At the time of Ext.A1 partition, she was a minor child and she was unnamed. In 1124 M.E., at the time when Ext.A2 property was purchased, the fifth defendant was aged only three years. She is not a competent witness to speak about the acquisition of the plaint schedule property in the year 1124 M.E. or to speak about the availability or otherwise of separate funds with Unnymayamma for the acquisition. In short, there is complete dearth of evidence on the part of the contesting defendants to establish their contention that the plaint schedule property was the self-acquisition of Unnymayamma.

8. In **Achuthan Nair** v. **Chinnammu Amma and others** (AIR 1966 SC 411), the Supreme Court held that in the case of a property acquired in the name of karanavan of

a Marumakkathayam tharavad, there is a strong presumption that it is a tharavad property and that the presumption must hold good unless and until it is rebutted by acceptable evidence. In **Echaran alias Kunhukuttan Nair** v. **Devaki Amma** (1968 KLT 568), it was held that when a member of a tharvad, whether he be the karanavan or a junior member, is proved to have been in management of tharavad properties yielding appreciable income, a presumption arises that his acquisitions enure to the tharavad. The court below considered the oral and documentary evidence in the case in the light of the principles of law laid down by the Supreme Court and this Court and held that the plaint schedule property was acquired with the thavazhi income and that the plaint schedule property is available for partition. I concur with the reasoning and conclusion made by the court below.

9. There is no dispute as to the quantum of shares. The trial court held, while dealing with the claim for equitable allotment in favour of the fifth

defendant, thus:

> "In the instant case, 5th defendant is not a stranger in the family. She is also a member of the thavazhy. Therefore she can only claim an equitable relief, allotting the share of the property purchased by her, as far as possible into her share, while effecting separation of property during final decree stage."

However, in paragraph 14, the decretal portion of the judgment, there is no mention of any equity having been granted in favour of the fifth defendant. I make it clear that the fifth defendant shall be allotted, as far as possible, the property purchased by her as per Ext.B1. It is relevant to note here that the defendants raised a contention that defendants 1, 5 and 6 are entitled to 3/15 shares and the property assigned to the fifth defendant is less than the share of defendants 1, 5 and 6. At the time of passing the final decree this contention shall be taken note of and, to the extent possible, Ext.B1 property shall be allotted to the fifth defendant and if necessary taking in the share of the first defendant and/or the fifth defendant, so that the possession of the fifth defendant under Ext.B1 is not disturbed to the extent

possible.

10. For the aforesaid reasons, I am not inclined to interfere with the conclusions and findings rendered by the court below except to the extent of equity in favour of the fifth defendant as indicated above.

In the result, the Appeal is disposed of confirming the preliminary decree passed by the court below and the findings thereon except to the extent of the equity to be extended in favour of the fifth defendant as indicated above. There will be no order as to costs.

(K.T.SANKARAN)
Judge

ahz/

K.T.SANKARAN, J.

A.S.NO. 179 OF 1999

JUDGMENT

28th March, 2007